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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

RUSSELL LEE HAYS,

Defendant and Respondent.

E045076

(Super.Ct.No. RIM486359)

OPINION

APPEAL from the Superior Court of Riverside County. Robert M. Padilla,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Rod Pacheco, District Attorney, Daniel Ackerman and Matt D. Reilly, Deputy  
District Attorneys, for Plaintiff and Appellant.

Gary Windom, Public Defender, and William A. Meronek, Deputy Public  
Defender, for Defendant and Respondent.

In this appeal transferred from the appellate division of the superior court at the  
request of the defendant, Russell Lee Hays, the People challenge the superior court's

order granting defendant's motion to dismiss based on the People's failure to provide the discovery required by Penal Code section 1054 et seq. Specifically, the People contend the dismissal order was in error because there was no evidence of a *Brady*<sup>1</sup> violation. As discussed below, we conclude that the sparse record does not indicate whether the trial court found a *Brady* violation or engaged in the *Brady* analysis at all. For this reason, we reverse the trial court's order of dismissal and remand to the trial court with instructions to conduct a new hearing on defendant's motion to dismiss and to determine whether the People's failure to comply with the court's discovery orders violated *Brady*, and whether sanctions short of dismissal are appropriate.

#### **STATEMENT OF FACTS<sup>2</sup>**

On June 20, 2006, Riverside Police Officer Fishell responded to a call regarding a possible battery. When Officer Fishell arrived at the scene, he saw defendant lying on his left side in the parking lot. Defendant was bleeding and had lacerations to his head, face and forearms. Defendant complained of pain. Medical aid was requested and the fire department (RFD) and an ambulance (AMR) responded to the scene.

When RFD and AMR arrived at the scene, they began treating defendant. As they tried to position defendant onto a stretcher, he began to resist by swinging his arm. Officer Fishell assisted by handcuffing defendant. While defendant was lying on his

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<sup>1</sup> *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

<sup>2</sup> The statement of facts is taken from the Amended Engrossed Settled Statement found at pages 76 to 79 of the clerk's transcript, except where otherwise noted.

back, he allegedly kicked Officer Fishell in the stomach. Sergeant Russell, Officer Fast and Officer Reynolds were also present at the scene and assisted Officer Fishell in restraining defendant. Because of defendant's behavior, RFD and AMR refused to transport him to the hospital, and left him at the scene with Officer Fishell. The officers were eventually able to handcuff and place defendant in the back of Officer Fishell's patrol vehicle. Defendant was arrested and taken to the hospital for an "OK to book."

On July 22, 2006, the People filed a criminal complaint charging defendant with one misdemeanor count of battery on a police officer and one misdemeanor count of public intoxication. (Pen. Code §§ 243, subd. (b) & 647, subd. (f).)<sup>3</sup> Defendant was arraigned on the misdemeanor complaint on August 1, 2006. A Trial Readiness Conference (TRC) was set for August 15, 2006, and a jury trial was set for August 29, 2006 (28 days after his arraignment). Defendant remained released on his own recognizance.

On August 3, 2006, the defense served a request for discovery on the People and filed a copy with the trial court. The document requested 29 separate pieces of discovery, including dispatch logs, police reports on the incident, audiotapes of police radio traffic, booking photographs, and belt recordings of the officers dispatched to the incident.

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<sup>3</sup> All statutory references are to the Penal Code unless otherwise indicated.

On August 15, 2006, at a TRC, the defense informed the court that it intended to file a “Pitchess” motion.<sup>4</sup> The TRC was continued until September 8, 2006. The trial court set a Mandatory Settlement Conference (MSC) for September 14, 2006. Defendant waived time for his jury trial to September 20, 2006 (50 days after his arraignment).

A further TRC was held on September 8, 2006. The MSC for September 14, 2006 was confirmed.

On September 12, 2006, the defense placed the case on calendar to make an oral motion for discovery. The court granted the motion and ordered the People to produce all materials responsive to the defense’s August 3, 2006, discovery request by the next day. This included the following items that the defense specifically mentioned in its oral motion: dispatch logs identifying all peace officers and emergency medical personnel present during the incident from which the complaint arose; all written reports by peace officers present during the incident; and all belt recordings and photographs obtained by peace officers relating to the incident. The defense indicated that it would request sanctions, including dismissal, if the People failed to comply with the court’s order.

An MSC was held on September 14, 2006. The People had failed to comply with the court’s order of September 12, 2006, so the defense renewed its request for the materials described above. The defense also made a specific oral request for any supplemental reports by Officers Fast and Reynolds, both of whom were mentioned in

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<sup>4</sup> A defendant is entitled to discovery of a police officer’s confidential personnel records if those files contain information that is potentially relevant to the defense. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537-538.)

Officer Fishell's initial report of June 29, 2006. The People stated that they did not intend to call Officers Fast or Reynolds as witnesses. The defense stated that the supplemental reports of Officers Fast and Reynolds were necessary to determine whether the defense would call them as witnesses. The court ordered the People to provide the requested materials to the defense by the following day. The defense again indicated that it would request sanctions, including dismissal, if the People failed to comply with the court's order.

On September 15, 2006, the People provided the defense with Sergeant Russell's supplemental report. Also on that date, Deputy District Attorney Hoy entered a request into the district attorney's office computer system to request that investigative technicians secure audiotapes and photographs from the Riverside Police Department.

On September 20, 2006, the defense filed a "Notice of Motion and Motion to Dismiss" based on the People's failure to comply with the discovery rules set forth in section 1054 et seq. and the consequent violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Defense counsel stated that she still did not have all of the requested items of discovery and that she could not adequately represent defendant at trial without the requested items. The People told the court that it had turned over all items of discovery in its possession at that time. Defense counsel told the court that she did not have all of the police reports, nor any of the dispatch logs, belt recordings or photographs that she had requested. The People stated that it had provided the defense with Sergeant Russell's supplemental report on September 15. The defense stated that it still had not received the requested

supplemental reports of either Officer Reynolds or Officer Fast. Over the People's objection, the court granted the defense motion to dismiss.

The court's minutes indicate that "Count(s) 1[,] 2 dismissed in the interest of justice. (1385 PC)[.]" The minutes also indicate that the dismissal was "pursuant to PC 1054 et seq."

On October 17, 2006, the People appealed to the appellate division of the superior court. In their opening brief, the People argued that there was no violation of the United States Constitution, that is, no *Brady* violation, and thus no grounds to dismiss the case under section 1054. In its brief, the defense responded that there was a *Brady* violation and that no lesser sanctions were available under section 1054, subdivision (b) that would not have led to a violation of defendant's speedy trial rights under the Sixth Amendment or his due process rights under the Fifth and Fourteenth Amendments. The People responded that, absent *Brady* error, the appropriate remedy for the discovery violation was a continuance, and that this would not violate defendant's rights to due process and a speedy trial.

On January 14, 2008 the appellate division of the superior court issued a per curiam opinion holding that the trial court erred in dismissing the case because it had not found any *Brady* violation. The appellate division also commented that: 1) the record does not indicate that the trial court "even . . . engaged in the appropriate analysis"; and 2) in any case, the People had never produced the evidence, and, under *People v. Ashraf* (2007) 151 Cal.App.4th 1205, the court could not presume that the evidence was *Brady*

material.<sup>5</sup> The appellate division reversed the trial court's order dismissing the charges and remanded the case so the charges could be reinstated. The appellate division instructed the trial court to conduct a new hearing on defendant's motion to dismiss and to determine whether the district attorney's failure to comply with the court's discovery orders violated *Brady*, and whether sanctions short of dismissal are appropriate.

On January 29, 2008, the defense filed a petition for rehearing with the appellate division. Also on that date, the defense filed an application asking the appellate division to certify the appeal to this court. The appellate division summarily denied the petition and the application on February 8, 2008. On February 8, 2008, the defense filed a petition to transfer the appeal to this court, which this court granted on February 19, 2008.

## **DISCUSSION**

### **1. Did the Trial Court Conduct a Proper *Brady* Analysis?**

Section 1054 et seq., also known as the reciprocal discovery statute, requires the prosecution to “disclose to the defendant or his or her attorney” certain “materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies.” Such materials include : “(a) The names and addresses of persons the prosecutor intends to call as

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<sup>5</sup> “The record here contains no indication whatsoever that the trial court found the [d]istrict [a]ttorney's failure to timely serve discovery violated [defendant's] *Brady* rights, or even that it engaged in the appropriate analysis. This is understandable because there is no inkling what the evidence might actually contain *because it was never produced.*”

witnesses at trial. [¶] . . . [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . .” (§ 1054.1, subds. (a), (e) & (f).) In the absence of good cause, this evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)

Subdivision (b) of section 1054.5 provides, “Upon a showing that a party has not complied with Section 1054.1 . . . a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.” Subdivision (c) of that section provides, however, “The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States.”

The only substantive discovery mandated by the United States Constitution is the disclosure of material exculpatory evidence under *Brady*, and so the remedy of dismissing a charge under section 1054.1 is limited to those situations in which the trial court finds a *Brady* violation. (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 40, 41.) ““Thus, the question here is not whether the trial court abused its discretion in dismissing the case, but whether the trial court erred as a matter of law in dismissing the case because the federal Constitution does not require dismissal.”” (*Id.* at p. 49, quoting *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1212 (*Ashraf*).)

Here, as explained in the opinion issued by the appellate division, there is no indication in the record as to whether the trial court did in fact find a federal Constitutional violation or engaged in the *Brady* analysis. This is because the trial court's minute order simply states that the dismissal was "pursuant to PC 1054 et seq." Further, and unfortunately, no record transcript of these hearings exists.<sup>6</sup> For this reason, we agree with the appellate division that the appropriate remedy is to reverse the trial court's order of dismissal and remand for a new hearing on defendant's motion to dismiss and to determine whether the People's failure to comply with the trial court's discovery orders violated *Brady*.

## 2. *People v. Ashraf*

We wish to make it clear that, when it engages in the *Brady* analysis on remand, the trial court should not be guided by the appellate division's comment to the effect that, unless the prosecution produces the evidence, it could be impossible to find a *Brady* violation. The appellate division commented in its opinion: "This is understandable [that the trial court did not find a *Brady* violation] because there is no inkling what the evidence might actually contain *because it was never produced*." This is too broad a

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<sup>6</sup> In its notice of appeal filed with the appellate department on October 17, 2006, the People requested a transcript of the electronic recording for the proceedings held in the trial court on September 12, 14, and 20, 2006. The minute order for an ex parte hearing on the People's request for transcripts, dated April 30, 2007, indicates the motion was denied. On May 9, 2008, this Court on its own motion directed the clerk of the superior court to prepare a supplemental reporter's transcript of those same proceedings. On June 12, 2008, the clerk of the superior court filed a certificate with this Court stating that no reporter was present at those proceedings and that the tape recordings were destroyed six months after the recording date.

reading of *Ashraf*. In *Ashraf*, the appellate court concluded that dismissal as a discovery sanction under section 1054 et seq. was not required because the evidence that the People failed to disclose was not favorable to the defendants. In doing so, the *Ashraf* court stated that “Of course, to determine whether evidence that was not disclosed to the defense was favorable and material under *Brady*, we must have some idea of what that evidence was.” (*Ashraf*, *supra*, 151 Cal.App.4th at p. 1212.) The defense has a right to timely pretrial discovery under section 1054 et seq. and must be given a full opportunity to make a showing that the materials it seeks actually exist, and are both favorable and material to the defendant under the *Brady* standard.

### 3. Sanctions Short of Dismissal and Speedy Trial Rights

Finally, we agree with the appellate division when it directed the trial court to determine whether sanctions short of dismissal would be appropriate. Consequently, we disagree with defendant’s contention that the use of a continuance as a remedy for the prosecution’s failure to comply with the discovery statutes would necessarily violate his speedy trial rights. First, while the federal Constitution does guarantee to criminal defendants the right to a speedy trial (U.S. Const., 6th Amend.; *People v. Martinez* (2000) 22 Cal.4th 750), that right is not necessarily violated when the trial court enforces the defendant’s right to discovery by continuing the trial rather than by dismissing it. This is because, under the balancing test outlined in *Barker v. Wingo* (1972) 407 U.S. 514, 530 (*Barker*) for determining whether speedy trial rights have been violated, the court must first consider the length of the delay, the reason for the delay, the defendant’s assertion of the right, and prejudice to the defense caused by the delay. (*Id.* at p. 530, fn. 30.)

Second, the Legislature has made it clear in the criminal discovery statutes that such discovery is governed strictly and solely by the relevant statutes and by the federal Constitution. For example, subdivision (e) of section 1054 specifies that one purpose of the discovery statutes is “[t]o provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” Further, subdivision (a) of section 1054.5 states in part that, “No order requiring discovery shall be made in criminal cases except as provided in this chapter.” Finally, section 1054.5, subdivision (c), provides in part that, “The court shall not dismiss a charge [as a sanction for failure to disclose information requested through discovery] unless required to do so by the Constitution of the United States.” The Legislature has thus conveyed through the criminal discovery statutes that it favors sanctions short of dismissal. This explicit direction by the Legislature leaves this Court with little desire or traction for imposing a new, court-created right to use dismissal as a discovery sanction. For this reason, and because it would be difficult to establish that ordering a continuance as a remedy for the prosecution’s failure to comply with discovery would be an actual violation of the speedy trial right under the criteria set forth in *Barker*, we decline to create this new right.

#### **DISPOSITION**

We reverse the trial court’s order of dismissal and remand to the trial court with directions to conduct a new hearing on defendant’s motion to dismiss and to determine whether the People’s failure to comply with the court’s discovery orders violated *Brady*, and whether sanctions short of dismissal are appropriate.

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RAMIREZ  
P.J.

We concur:

HOLLENHORST  
J.

McKINSTER  
J.